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Supreme Court of the United States

October Term, 1932

No. 390

BROAD RIVER POWER COMPANY
Appellant

v.

WALTER G. QUERY, J. P. DERHAM and FRANK C. ROBINSON, as Members of and Constituting the South Carolina Tax Commission
Appellees

No. 391

LEXINGTON WATER POWER COMPANY
Appellant

v.

WALTER G. QUERY, J. P. DERHAM and FRANK C. ROBINSON, as Members of and Constituting the South Carolina Tax Commission
Appellees

ON APPEAL FROM FINAL DECREES OF STATUTORY COURT (U. S. DISTRICT COURT, EASTERN DISTRICT, S. C.) DENYING INJUNCTION

BRIEF OF APPELLANTS

C. EDWARD PAXSON
GEORGE M. LE PINE
W. C. McLAIN
Counsel for Appellants

ELLIOTT, McLAIN, WARDLAW & ELLIOTT
Columbia, S. C.

TRAVIS, PAXSON, WALLACE & PHILBIN
New York City
Of Counsel

BAR PRESS, INC., 84-86 WASHINGTON STREET, NEW YORK. BO. 9 - 0157-8

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BRIEF OF APPELLANTS

I

Opinion of Court Below

The opinion below (*South Carolina Power Co.* v. *South Carolina Tax Commission*) is reported in 60 F. (2d) 528. This opinion was rendered in three cases against the South Carolina Tax Commission, which included the two cases above entitled. The court below denied an injunction restraining the enforcement of a statute levying a tax on electricity, which was the relief prayed for. The same court had previously denied an interlocutory injunction. Its opinion thereon is reported in 52 F. (2d) 515. The decision of the court below on the denial of an interlocutory injunction was affirmed (286 U. S. 525) without considering the merits, on the authority of *Alabama* v. *United States*, 279 U. S. 229, and similar cases.

The Question Involved

The question involved in these cases is the constitutionality of a statute of the State of South Carolina (printed as an appendix hereto) which purports to levy a tax of one-half mill per kilowatt hour on electricity generated or sold within the State of South Carolina.

II

Statement of the Case

These suits were instituted in the United States District Court for the Eastern District of South Carolina against the South Carolina Tax Commission, the relief prayed

being an injunction against the enforcement of a statute of the State of South Carolina, printed as an appendix hereto, enacted at the session of the State Legislature in 1931, imposing a tax of one-half mill per kilowatt hour, as "an excise, license or privilege tax" upon the following persons:

(a) Every person, firm or corporation engaged in the business of manufacturing or generating hydro-electric power in the State of South Carolina;

(b) Every person, firm or corporation engaged in the business of manufacturing or generating electric power by the use of steam power in the State of South Carolina;

(c) Every person, firm or corporation engaged in the business of selling electric power within the State of South Carolina.

The statute exempts from the tax the following persons (Section 1, Subdivision c):

1. Sellers of electricity which has been subject to the payment of a generation tax, who are allowed a credit for the amount of tax paid by the person, firm or corporation generating the same.

2. Electric power manufactured or generated in another State and brought into South Carolina until such power has lost its interstate character and immunities.

3. Any person, firm or corporation owning and operating a generating plant of ten horse-power or less.

4. Industrial plants manufacturing or generating power for their own use, or for use upon their own premises by their *bona fide* operatives or employees, "but the

tax shall be paid upon so much thereof as may be sold to other than its employees."

5. Municipalities manufacturing or generating electricity for the use of their customers.

The Act further provides (Section 3) for a monthly return by the persons subjected to the tax and requires the tax to be paid monthly. Failure to make a monthly return subjects the offender to a 25% penalty, and failure to pay the tax subjects the offender to an additional penalty of 25%. Persons liable to the tax are permitted to pay the same under protest (Section 4), but the right to recover taxes so paid is subject to a statute of limitations requiring suit to be brought within thirty days after payment, and in case of recovery the taxpayer is permitted to recover the amount of the tax with interest at 4%.

The appellant Lexington Water Power Company is a company engaged in the generation of electricity at a plant constructed under a license from the Federal Power Commission, all of which electricity is sold at wholesale to distributing companies. The appellant Broad River Power Company generates and distributes electricity to ultimate consumers.

The bills of complaint* (R. 1) alleged that the statute above referred to was violative of various provisions of the State and Federal Constitutions. A preliminary injunction was applied for (R. 34) and thereafter the District Judge called to his assistance two circuit judges to hear the applications for a preliminary injunction.

The statutory court made findings of fact and conclusions of law (R. 68) in which it found that the statute

* While there are separate transcripts on each of these two appeals, the records are practically identical and for convenience all references are made to the transcript in No. 391, except as otherwise noted.

was subject to no constitutional objections, and accordingly a decree denying an interlocutory injunction was entered (R. 71). The statutory court rendered its opinion through PARKER, Circuit Judge (R. 45). That decree was affirmed by this court, without considering the merits (286 U. S. 525). The case then proceeded to final hearing in the statutory court, which entered its final decree denying an injunction (R. 75), making new findings of fact and conclusions of law (R. 79). Thereupon, this appeal was instituted. (For petition to appeal, assignment of errors and prayer for reversal, see R. 85; order allowing appeal, R. 87.)

The grounds upon which it is claimed the statute in question is unconstitutional, so far as they are now insisted upon, are as follows:

1. That the taxing statute denies to the appellants the equal protection of the laws, in violation of the Fourteenth Amendment to the Constitution of the United States, because the tax is imposed upon the production of electricity by water power or steam power, while the production of electricity by the use of oil or internal combustion engines is not taxed. It appears that there are in the State of South Carolina plants at which electric energy is generated by oil or combustion engines. (See Finding of Fact No. 9; R. 81.) It is the contention of the appellants that failure to tax electricity of this character renders the statute unconstitutional.

2. That the statute denies to the appellants the equal protection of the laws because it exempts from the tax industrial plants generating power for their own use or for the use of their employees.

3. As to Lexington Water Power Company only, that the statute is violative of the Federal Constitution in that the tax imposed upon the appellant in this case is a tax upon an agency of the Federal Government. All of the electricity generated by the Lexington Water Power Company is generated at a water power plant owned by it and located on the Saluda River in the State of South Carolina. This plant was constructed and is operated pursuant to a license duly granted by the Federal Power Commission pursuant to the provisions of the Federal Water Power Act (R. 4). The license of the appellant was printed as an Exhibit to the bill of complaint (R. 18), and it is contended that to impose an excise, license or privilege tax on this operation is to tax a Federal Agency and so violative of the Federal Constitution.

The equitable jurisdiction of the court was invoked on the ground that there was no adequate remedy at law for two reasons:

(a) The remedy at law would result in a multiplicity of suits, due to the fact that under the express terms of the statute a suit to recover a tax paid under protest must be instituted within thirty days after each monthly payment, or be barred by the statute of limitations;

(b) The remedy at law was not complete for the reason that the statute permitted the recovery of only 4% interest on taxes paid under protest.

While the case was determined below on affidavits, there is no dispute as to the facts.

III

Specification of Errors

The statutory court erred in holding:

1. That the taxing statute in question did not deny to the appellants the equal protection of the laws, in violation of the Fourteenth Amendment to the Constitution of the United States, in exempting from taxation the production of electricity by the use of oil or internal combustion engines (R. 82).

2. That the taxing statute in question did not deny to the appellants the equal protection of the laws, in violation of the Fourteenth Amendment to the Constitution of the United States, in exempting from the tax industrial plants generating power for their own use or for the use of their employees (R. 82).

3. That the taxing statute in question was not violative of the Constitution of the United States as constituting a tax upon an agency of the Federal Government (R. 83).

IV

Summary of Points Discussed

1. The taxing statute in question violates the Fourteenth Amendment to the Constitution of the United States in exempting from taxation the production of electricity by the use of oil or internal combustion engines (p. 8, *infra*).

2. The taxing statute in question violates the Fourteenth Amendment to the Constitution of the United States in exempting from taxation industrial plants generating power for their own use or for the use of their employees (p. 14, *infra*).

3. The taxing statute in question as applied to appellant Lexington Water Power Company imposes a tax upon an agency of the Federal Government in violation of the Constitution of the United States (p. 17, *infra*).

4. The remedy at law being inadequate, a court of equity should restrain the enforcement of the taxing statute in question (p. 21, *infra*).

V

ARGUMENT

POINT ONE

The Taxing Statute in question violates the Fourteenth Amendment to the Constitution of the United States in exempting from taxation the production of electricity by the use of oil or internal combustion engines.

It appears that there are in the State of South Carolina plants at which electric energy is generated by oil or combustion engines, and that the electric energy so generated is of exactly the same character as electricity generated by hydro-electric or steam generating plants (R. 6, and see Finding of Fact No. 9, R. 81). Nevertheless, the statute in question taxes only the generation of hydro and steam

generated electricity. The statutory court took the position that the production of electric current by the use of oil or internal combustion engines was a business so fundamentally different from the production of electric current at hydro or steam plants that the Legislature was justified in its classification. The lower court said:

> "The record shows that only two very small plants in the state of South Carolina are engaged in producing electricity in this manner; and, if the legislature knew of their existence at all, it may well have determined that the volume of their business was so small and their relative cost of production so great as to put them in a class entirely different from the great power companies producing current from water power and coal" (R. 50).

The general principles which control the states in classification for taxing purposes are well settled.

In *Ohio Oil Co.* v. *Conway,* 281 U. S. 146, the court said:

> "The applicable principles are familiar. The States have a wide discretion in the imposition of taxes. When dealing with their proper domestic concerns, and not trenching upon the prerogatives of the national government or violating the guarantees of the Federal Constitution, the States have the attribute of sovereign powers in devising their fiscal systems to insure revenue and foster their local interests. The States, in the exercise of their taxing power, as with respect to the exertion of other powers, are subject to the requirements of the due process and the equal protection clauses of the Fourteenth Amendment, but that Amendment imposes no iron rule of equality, prohibiting the flexibility and variety that are appropriate to schemes of taxation. The State may tax real and personal property in a different manner. It may grant

exemptions. The State is not limited to *ad valorem* taxation. It may impose different specific taxes upon different trades and professions and may vary the rates of excise upon various products. In levying such taxes, the State is not required to resort to close distinctions or to maintain a precise, scientific uniformity with reference to composition, use or value. To hold otherwise would be to subject the essential taxing power of the State to an intolerable supervision, hostile to the basic principles of our Government and wholly beyond the protection which the general clause of the Fourteenth Amendment was intended to assure.

"With all this freedom of action, there is a point beyond which the State cannot go without violating the equal protection clause. The State may classify broadly the subjects of taxation, but in doing so it must proceed upon a rational basis. The State is not at liberty to resort to a classification that is palpably arbitrary. The rule is generally stated to be that the classification 'must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.' *Royster Guano Company* v. *Virginia*, 253 U. S. 412, 415; *Louisville Gas Company* v. *Coleman*, 277 U. S. 32, 37; *Air-Way Corporation* v. *Day*, 266 U. S. 71, 85; *Schlesinger* v. *Wisconsin*, 270 U. S. 230, 240."

The same principles are stated in the opinion of this court in *State Board of Tax Commissioners of Indiana* v. *Jackson*, 283 U. S. 527.

The question, therefore, is whether the classification is "palpably arbitrary" and whether the classification rests "upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." within the State, because of its discriminatory feature is not used by them on their premises for lighting purposes,

Applying these tests to the case at bar the question may be said to be whether the business of generating electricity by oil or internal combustion engines is a different business than that of generating electricity at a water power or steam plant. The purpose of this generation is to provide electricity for distribution to retail consumers. The electricity so generated has the same characteristics as electricity generated in any other manner. The electricity is useful and used for the same purposes. To exempt such electricity from the generation tax results in precisely the discrimination which the Fourteenth Amendment prohibits. It places one manufacturer of electricity on a better plane than another. It fosters one class because, as stated by the court below, "their relative cost of production (is) so great" (R. 50). It penalizes generators of electricity who by a greater investment produce electricity more economically. If the statute had classified generators of electricity according to their cost of production there would be no question that the statute was unconstitutional. To permit the Legislature to classify according to the method of generation and justify the classification because of the greater cost of one method is subject to absolutely the same objection.

In the absence of a better "ground of difference" it must be said that the statute does not treat all persons similarly circumstanced alike.

The classification in the statute in question must be held to be "a mere arbitrary selection."

This court has held taxing statutes to be objectionable which were no more arbitrary in their classification than is the statute here in question.

In *Royster Guano Company* v. *Virginia*, 253 U. S. 412, this court set aside a statute taxing the entire income, earned within and without the State, of domestic corporations, which exempted domestic corporations doing no business within the State, because of its discriminatory feature in not exempting the foreign income of all domestic corporations.

In *Southern Railway Co.* v. *Greene*, 216 U. S. 400, this court set aside a franchise tax imposed upon foreign railroad corporations operating within the State of Alabama, based upon the amount of capital stock employed within the State, where the tax on domestic corporations was at a lower rate.

The state courts have held unconstitutional statutes which are more nearly like the one here involved. Thus, in *Salt Lake City* v. *Utah L. & Rwy. Co.*, 45 Utah 50, the imposition of a license tax of a certain sum per meter upon electric companies furnishing electricity through meters, and no tax on electric companies not using meters, was held unreasonable in its classification.

In *Standard Oil Co.* v. *Fredericksburg*, 105 Va. 82, an ordinance imposing one rate of taxation on oil dealers selling oil brought into the city in tank cars or pipes, and a different rate on dealers in oils brought into the city in other ways was held discriminatory.

Likewise, in *Pullman P. C. Co.* v. *State*, 64 Tex. 274, a statute taxing the occupation of operating sleeping cars on railroads, which exempted railroads operating their own sleeping cars, was held arbitrary in its classification.

Under these authorities it cannot be questioned that the classification of electric companies according to their method of generation, as is attempted by the statute in question, is violative of the Fourteenth Amendment.

The lower court suggested that because the sale of electricity produced by internal combustion engines was taxed, this might be given some effect (R. 50). This, however, does not in any way affect the objection to the statute for the reason that even if the tax were so applied, the taxation would be at a different rate. The taxing statute in question, so far as it taxes the sale of electricity (Section 1 [c], R. 14), taxes only the electricity sold, which means the amount of electricity recorded by the consumers' meters, and does not tax electricity used by the generating company, or what is commonly known as line losses. The result is that generators of electricity by oil or combustion engines pay a tax of a much smaller amount than generators of electricity by water or steam power producing the same amount of electricity. If the classification is unreasonable, the fact that some tax is imposed on persons generating by oil or combustion engines does not save the statute.

If this statute can be sustained, then it must be said that the State can tax electricity generated by the use of anthracite coal as a fuel at one rate, generators by the use of bituminous coal at another rate, and generators of electricity in steam plants using fuel oil at an entirely different rate. Such legislation has absolutely no basis for justification.

POINT TWO

The Taxing Statute in question violates the Fourteenth Amendment to the Constitution of the United States in exempting from taxation industrial plants generating power for their own use or for the use of their employees.

Section 1 (c) of the Taxing Statute in question (R. 15) contains the following proviso:

> "Nor shall the provisions of this act apply to industrial plants manufacturing or generating power for its own use, or for use upon its own premises by its *bona fide* operatives or employees but the tax shall be paid upon so much thereof as may be sold to other than its employees."

There are in the State of South Carolina a large number of manufacturing companies having textile plants and also engaged in the generation of electricity, some of which is consumed in manufacturing, some furnished to employees, and a large amount sold to the general public. Under the statute the only tax paid by such companies is on the electricity consumed by the general public as shown by the consumers' meters. These companies are engaged in the public utility business so far as their outside activities are concerned. Under the statute in question these companies are taxed on their electric operations at a much lower rate than the appellants in this case. It appears that the appellants generate a large amount of electric energy which is used by them on their own premises for lighting purposes, power purposes and for the use of their employees who reside on premises owned by the appellants. The appellants

also consume a large amount of the electricity generated by them for the purpose of maintaining voltages on transmission lines (commonly known as line losses) (R. 7). Under the taxing statute in question the appellants are required to pay a tax on all electricity generated by them, including the electricity used for their own purposes and the purposes of their employees. The result of the statute is that one class of generators of electricity, including the appellants, is taxed on all electricity generated, if they do not own a textile mill, while another generator of electricity, if it owns a textile mill, is taxed solely on the electricity shown on the meters of its consumers, other than employees, to have been consumed by them. There is absolutely no difference in the type of business conducted by the two classes, so far as its activities as a public utility are concerned, and yet the Legislature classifies them differently for the purpose of taxation.

The lower court attempted to sustain this classification under the decision of this court in *American Sugar Refining Co.* v. *Louisiana,* 179 U. S. 89. That case involved a license tax on persons engaged in the business of refining sugar and molasses, but provided that the statute should not apply to planters and farmers grinding and refining their own sugar and molasses. The court said that:

> "The act is not one exempting planters who use their sugar in the manufacture of articles of a wholly different description, such as confectionery, preserves or pastry, or such as one which should exempt the farmer who devoted his corn or rye to the making of whiskey, while other manufacturers of these articles were subjected to a tax. A somewhat different question might arise in such case, since none of these articles are the natural products of the farm—such products only becoming useful by being commingled with other ingredients. Refined sugar, however, is

> the natural and ultimate product of the cane, and the various steps taken to perfect such product are but incident to the original growth."

This, however, supports rather than detracts from the position taken by the appellants in this case. Here, the Legislature is not fostering the production of a local commodity by the producers, but is fostering the electric business of textile companies at the expense of others engaged in the electric business who are not engaged in textile manufacturing. There would be no objection in this connection to a sales tax which exempted electricity consumed by the producer in his own manufacturing business, if other generators of electricity were taxed solely on the electricity sold to the general public. This, however, is not the case. One result of this discrimination is that textile companies engaged in the electric business are put in a more favorable position to compete for business at wholesale or retail at distant points due to the fact that they are required to pay a tax only on the amount of electricity sold at the point of consumption, while other electric companies must pay a tax on all electricity generated, including electricity consumed at the plant and in keeping up voltages on transmission lines to the ultimate point of consumption. Another result is that textile mills which purchase their electricity are indirectly taxed thereon, which can have but one effect on electric companies generally, to wit, a loss of all textile consumers. While the rate of tax here in dispute is only one-half mill per kilowatt hour, if the tax is sustained there is no limit to the taxing power of the State, and, in fact, an increase in the tax has already been proposed. This is discrimination of the worst type and under the decisions discussed under Point One the statute must be held to be arbitrary in its classification of the subjects of taxation.

POINT THREE

The Taxing Statute in question as applied to appellant Lexington Water Power Company imposes a tax upon an agency of the Federal Government in violation of the Constitution of the United States.

All of the electricity generated by the appellant Lexington Water Power Company is generated at a water power plant owned by it located on the Saluda River in Lexington County, South Carolina. This plant was constructed and is operated pursuant to a license duly granted by the Federal Power Commission pursuant to the provisions of the Federal Water Power Act (Finding of Fact No. 12; R. 81). A copy of the license granted to the appellant was attached as an exhibit to the bill of complaint (R. 18).

It is the contention of the appellant that the tax in question, as applied to it, is an "excise license or privilege tax" (see Sec. 1 [a] of Statute; R. 14) on an agency of the Federal Government.

Since the case of *McCulloch* v. *Maryland,* 4 Wheat. 316, it has been unquestioned law that a state is without power to tax the exercise of a privilege granted by the Federal Government.

The Federal Water Power Act (U. S. Code Annotated, Title 16, Sec. 791, *et seq.*) provides in Section 4 for the issuance of licenses for the purpose of constructing, operating and maintaining dams and power houses, among other things, necessary or convenient for the development and improvement of navigation in any of the navigable waters of the United States. Section 14 of the Act gives the United States the right upon or after the expiration of

any license (50 years) to take over and thereafter to maintain and operate any project constructed under license, upon paying to the licensee the net investment of the licensee in the project or projects so taken, not to exceed the fair value of the property taken, etc. Net investment is defined in Section 3 of the Act to mean the actual legitimate original cost plus the cost of additions and betterments, minus certain items which include amortization reserves. Under Section 10 of the Act, all licenses are required to contain a condition that after the first twenty years of operation out of surplus earned thereafter accumulated in excess of a specified rate of return, the licensee shall establish and maintain amortization reserves, which are to be held until the termination of the license or be applied from time to time in reduction of the net investment.

Pursuant to these provisions of the statute the license of this appellant in Article XXII contains the provision required by law as to amortization reserves and specifies the rate of return as required by the Act (R. 29-30).

It, therefore, becomes apparent that the tax in question as applied to this appellant, not only is a tax on the privilege of operating under a license granted by the Federal Government, but payment thereof will increase the amount which the Federal Government must pay on taking over the project at the expiration of the license, as such taxes operate to reduce the earnings of the project. At the present rate of tax this increases by $150,000 per year (R. 4), for a period of thirty years the amount which the Federal Government would have to pay at the expiration of this license for the project.

If a state is not permitted to tax the operations of a national bank (*Owensboro National Bank* v. *Owensboro*,

173 U. S. 664), or the gross receipts of a company mining Indian coal under the lease from the Federal Government (*Choctaw & Gulf R. R.* v. *Harrison*, 235 U. S. 292), or the income of a lessee operating under a lease of Indian lands from the Federal Government (*Gillespee* v. *Oklahoma*, 257 U. S. 501), it would seem to be clear that a state has no power to tax the privilege of operating under a license from the Federal Power Commission. (See also *Barnet* v. *Coronado Oil & Gas Co.*, 285 U. S. 393.) Some of the decisions which have denied the rights of the states in this respect, have operated merely to enrich the person held to be immune from taxation, but in the case at bar the effect of sustaining the immunity from taxation is to reduce the amount which must be paid by the Federal Government on taking over the project. If the doctrine that a Federal agency cannot be taxed on its operations is to be sustained on the theory that it imposes a burden on the Federal Government, acting through an agency selected by it, it certainly must be applied to the case at bar where the direct burden of the tax must eventually fall on the Federal Government.

The court below, in denying this contention, relied upon the case of *Susquehanna Power Company* v. *Tax Commission*, 283 U. S. 291, in which this court held that a licensee under the Federal Water Power Act was not immune from taxation on the land lying under the pool created by the licensee's dam. This court held that such a licensee was not immune from taxation on its property. The court said that

> "the challenge tax is imposed, not on the license, but on the private property of the licensee used in its business."

The court pointed out that in *McCulloch* v. *Maryland,* 4 Wheat. 316, the distinction had been made between a franchise or privilege granted by the Government to a private corporation in order to effect some governmental purpose, and the property employed by the grantee in the exercise of the privilege. It was accordingly held that the property (land) of the licensee was subject to taxation by the state.

The court below took the position that the tax here imposed was a tax on the property of the appellant within the case above cited on the theory that an excise tax on production or sales is in effect a tax on the property produced or sold, citing *Kehrer* v. *Stewart,* 197 U. S. 60 and *Welton* v. *Missouri,* 91 U. S. 275.

The case of *Welton* v. *Missouri, supra,* dealt with a statute requiring a license to deal in the sale of merchandise not produced within the state. This court held that in effect this imposed a tax upon the goods themselves and, accordingly, that the statute imposed a burden upon interstate commerce. In the case of *Kehrer* v. *Stewart, supra,* the same rule that a tax upon the seller of goods was a tax upon the goods themselves was laid down. Neither of these cases has any application to the case at bar. The only thing that could be said to be taxed is electricity, and this electricity is produced (generated) under the license from the Federal Power Commission. The tax could not be a property tax because the Constitution of the State of South Carolina (Article X, Section 1) requires that all property shall be assessed at a uniform rate and property taxes are required to be *ad valorem* (Article III, Section 29). If any such principle were to be sanctioned by this court, the rule that an agency of the Federal Government cannot be taxed on its privileges would be rendered nugatory.

This appellant is paying without question all taxes on its property, but it contends that the state has no power to go beyond this and tax the earnings which accrue to it by virtue of its license under the Federal Water Power Act.

POINT FOUR

The remedy at law being inadequate, a court of equity should restrain the enforcement of the Taxing Statute in question.

Section 3 of the statute in question requires persons subject to the tax to make a monthly return and to pay the amount of the tax for electricity generated in the previous month at the time of making the return. Failure to make a return subjects the offender to a penalty of 25% and failure to pay the tax results in an additional penalty of 25% (R. 16). Section 4 of the Act provides that the tax may be paid under protest and that the person so paying the tax may at any time within thirty days after making such payment, "but not afterwards," bring an action for recovery of the tax, and if successful, may recover the tax with interest at 4%.

Requiring as it does the institution of suits each month to recover back taxes paid under protest, with a statute of limitations of thirty days, it is clear that equity has jurisdiction to restrain the enforcement of the statute because the pursuit of the legal remedy would result in a multiplicity of actions.

Oelrichs v. *Spain,* 15 Wall. 211;
U. S. v. *Osage County,* 251 U. S. 128;
Cummings v. *National Bank,* 101 U. S. 153.

It is also clear that the remedy at law is not adequate because the taxpayer is permitted to recover interest at the rate of only 4%. The fact that interest was not recoverable in an action at law was mentioned as one ground for equity jurisdiction to restrain an alleged illegal tax in *Hopkins* v. *S. California Telephone Company,* 275 U. S. 393, and a state certainly cannot avoid the effect of this rule by allowing inadequate interest.

VI

CONCLUSION

The judgments of the court below should be reversed.

C. Edward Paxson,
George M. Le Pine,
W. C. McLain,
Counsel for Appellants.

THE TAXING STATUTE

An Act to Raise Revenue for the Support of the State Government by the Imposition of an Excise Tax Upon Electric Power Generated and Sold Within this State.

SECTION 1.—Be it enacted by the General Assembly of the State of South Carolina: (a) That in addition to all other taxes of every kind now imposed by law, every person, firm or corporation engaged in the business of manufacturing or generating hydro-electric power in the State of South Carolina shall be subject to the payment of an excise, license or privilege tax of five-tenths of one mill upon each kilowatt hour of hydro-electric power manufactured or generated, and said tax shall be paid to and collected by South Carolina Tax Commission.

(b) That in addition to all other taxes of every kind now imposed by law, every person, firm or corporation engaged in the business of manufacturing or generating electric power by the use of steam power in the State of South Carolina shall be subject to the payment of an excise, license, or privilege tax of five-tenths of one mill upon each kilowatt hour of electric power so manufactured or generated and said tax shall be paid to and collected by South Carolina Tax Commission.

(c) That in addition to all other taxes of every kind now imposed by law, every person, firm or corporation engaged in the business of selling electric power within the State of South Carolina shall be subject to the payment of an excise, license, or privilege tax of five-tenths of one mill upon each kilowatt hour of electric power sold in the State of South Carolina and said tax shall be paid to and

collected by South Carolina Tax Commission: Provided, That if such seller procures electric power which has been subject to the payment of the excise, license or privilege tax hereinbefore provided a credit on said tax to the amount of the excise tax already required to be paid by the person, firm or corporation generating the same within this State shall be allowed: Provided, Further, That the provisions of this Act shall not apply to the electric power manufactured or generated in another State and brought into this State until such power has lost its interstate character and immunities: Provided, Further, That the provisions of this Act shall not apply to any person, firm or corporation owning and operating an electric manufacturing or generating plant of ten horsepower or less, nor shall the provisions of this Act apply to industrial plants manufacturing or generating power for its own use, or for use upon its own premises by its bona fide operatives or employees but the tax shall be paid upon so much thereof as may be sold to other than its employees: Provided, Further, That the provisions of this Act shall not apply to municipalities manufacturing or generating electricity for the use of its customers.

Section 2.—Every person, firm or corporation engaged in the business of manufacturing, generating or selling electric power in this State shall provide themselves with and keep the necessary instruments to show the amount of electric power manufactured, generated or sold, expressed in kilowatt hours, and shall keep permanent, legible records showing the amount of power, expressed in kilowatt hours, manufactured, generated or sold each day. Such records and instruments shall be subject to examination by the Tax Commission or its duly authorized representatives at any time during business hours.

The South Carolina Tax Commission shall administer and enforce the tax imposed by this Act. It shall have the power to enter upon the premises of any tax payer and to examine, or cause to be examined, any of the instruments, books, records, etc., and to secure any other information directly or indirectly concerned in the enforcement of this Act. Also, make rules and regulations pertinent to the enforcement of this Act, which shall have the full force and effect of law.

Any person, firm or corporation required to keep either the necessary instruments or records prescribed in this Section shall be subject to a penalty of One Hundred ($100.00) Dollars per day for each day's omission to keep either the required instruments or required records. Such penalties to be collected in the same manner as herein provided for the collection of delinquent taxes: Provided, upon reasonable cause shown, the South Carolina Tax Commission may remit or refund the said penalties in whole or in part.

Section 3.—Every person, firm or corporation subject to the provisions of this Act shall between the first and tenth of each month, make a true and correct return to the South Carolina Tax Commission in such form as it may prescribe, showing the exact amount of electric power manufactured, generated or sold, expressed in kilowatt hours, during the previous month and remit the tax therewith.

In case of failure to make a true and correct return, the Tax Commission shall make the same upon such information as it may be able to obtain, assess the tax due thereon, and add a penalty of twenty-five per cent., and in case of failure to pay the tax, the South Carolina Tax Commission

shall add a penalty of twenty-five per cent., whereupon the South Carolina Tax Commission shall mail notice of the amount of taxes and penalty to the party failing to make such return or pay the tax, and if the tax and penalty is not paid within ten (10) days after mailing such notice, execution shall be issued in the manner and with the force provided hereafter in this Section. If any taxes or penalties imposed by this Act remain due and unpaid for a period of ten (10) days, the Tax Commission shall issue a warrant of execution directed to the Sheriff of any County of the State, commanding him to levy upon and sell the real and personal property of the taxpayer found within his County, for the payment of the amount thereof with penalties and the costs of executing the warrant, and to return such warrant to the Tax Commission and to pay it the money collected by virtue thereof.

The Sheriff to whom such execution is directed shall proceed to enforce same in the same manner provided by law for the enforcement of an execution issued by a County Treasurer against a delinquent tax payer. That the taxes and all penalties herein provided for, shall be held as a debt payable to the State by the party against whom the same shall be charged, and all such taxes, penalties and assessments shall be first lien in all cases whatsoever upon all property of the party charged therewith.

SECTION 4.—That if any clause, sentence, paragraph or part of this Act shall, for any reason, be adjudged by any Court of competent jurisdiction to be invalid, such judgment shall not affect, impair or invalidate the remainder of this Act, but shall be confined in its operation to the clause, sentence, paragraph or part thereof directly involved in the controversy in which such judgment shall

have been rendered. No caption of any Section or set of Sections shall in any way affect the interpretation of this Act or any part thereof: Provided, That the collection of the taxes or penalties imposed under the provisions of this Act shall not be stayed or prevented by any injunction, writ or order issued by any Court or Judge thereon. In all cases in which any taxes or penalties are required to be paid hereunder by any person, firm or corporation and the Tax Commission shall claim the payment of the taxes or penalties so assessed, or shall take any step or proceedings to collect the same, the person, firm or corporation against whom such taxes or penalties are charged, or against whom such step or proceedings shall be taken, shall, if he conceives the same to be unjust or illegal for any reason, pay the said taxes or penalties notwithstanding, under written protest, in such funds and monies as the South Carolina Tax Commission shall be authorized to receive, and upon such payment being made South Carolina Tax Commission shall make proper note that the same was paid under written protest and notify the State Treasurer that such taxes or penalties were paid under protest; that the person, firm or corporation so paying said taxes or penalties may at any time within thirty (30) days after making such payment, but not afterwards, bring an action against the South Carolina Tax Commission for the recovery thereof in any Court of competent jurisdiction and/or in proper cases in the Federal Courts and if it be determined in said action that such taxes or penalties were wrongfully and illegally collected for any reason going to the merits, then the Court before which the case is tried shall certify of record that the same were wrongfully collected and ordered to be returned with interest thereon at the rate of four (4%) per centum per annum.

Whereupon the Tax Commission shall issue its warrant upon the State Treasurer for refunding the taxes and penalties so paid, which shall be paid in preference to other claims against the treasury.

SECTION 5.—That the South Carolina Tax Commission may, in its discretion, compromise any action arising under the provisions of this Act, either before or after prosecution commenced. The South Carolina Tax Commission may, upon good cause shown, remit any penalties accruing under this Act, in whole or in part.

SECTION 6.—For the year 1931 the revenue produced under this Act shall reduce the 1931 property levy for State purposes to the full amount raised under the terms of this Act: Provided, further, That for the year 1932 and thereafter, the revenue derived under the provisions of this Act shall be turned into the State Treasury for the support of the State Government.

SECTION 7.—Any foreign corporation required to pay a tax hereunder for the year 1931, which shall not, for any cause whatsoever, have paid such license fee or tax, in addition to the payment of all license fees and taxes now or hereafter required by law, shall as an additional license fee or tax, for the year 1932, pay an amount equal to the license fee or tax provided for in this Act for the year 1931, and the payment of such additional license fee or tax for the year 1932 shall be a condition and part of the terms upon which they are allowed to enter this State and do business herein for the year 1932.

SECTION 8.—The tax provided in this Act shall be calculated and paid on all electric power manufactured, generated or sold, on and after the first day of May, 1931.

SECTION 9.—That this Act shall take effect immediately upon its approval by the Governor.

Approved the ninth day of May, 1931.